Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

To: The Commission

COMMENTS OF

UNITED STATES CELLULAR CORPORATION

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SUMMARY

For eight years, this Commission has steered a steady and consistent course, implementing the law that Congress wrote and fostering the twin goals of advancing universal service and competition. The law as implemented has been working well to encourage competitors to enter rural areas and construct new facilities to improve service, bring health and safety benefits, economic development, and advance competition to the benefit of consumers. The Joint Board's policy shift, to encourage the Commission to manage growth of the universal service fund by restricting competitive entry, is not competitively neutral and in some cases is diametrically opposed to previously adopted policies – some of which have been affirmed in the courts. To date, there is no record on which anyone could conclude that the Commission's rules are broken or that Congress' universal service mandate is not being fulfilled.

The Commission has recently acquiesced to the Fifth Circuit's *TOPUC* decision, despite its very clear determination that states are without authority to add additional criteria in ETC designation cases. *TOPUC* was wrongly decided and is not binding on the FCC throughout the nation. Given the mounting judicial criticism of *TOPUC*, the Commission must defend its appropriate legal interpretation as it is likely that the same issues will surface again in other proceedings, with different results.

The ETC designation process is in disarray. The Commission should amend its rules to make designations using adjudications, including elimination of "permit but disclose" status, which are appropriate in rulemaking proceedings, but not adjudications.

USCC urges the Commission to review the many ETC designation cases that have been made throughout the nation, including but not limited to Alaska, Washington, Oregon, Wisconsin, Minnesota, Arizona, New Mexico, Maine, West Virginia, and Mississippi. Most every state has employed procedures and substantive qualification requirements that are at least as stringent as those encouraged by the Joint Board. In many states, protracted administrative hearing proceedings, including discovery, briefing, hearings, oral argument, and appeals, have resulted in designations that contain a common theme: Competitive carriers deserve designation if they are serious about ETC commitments and consumers will be well served by much needed improvements in rural telecommunications infrastructure.

All else equal, limiting growth of the federal high-cost fund is a good thing. But doing so by restricting access by competitors is unlawful and completely ignores the long-term universal service benefits that will be achieved through the introduction of competition. As presently constructed, the federal high-cost "per-line" support mechanism drives only efficient competitors into rural areas and only provides support to competitors after they construct facilities and obtain and keep customers. The system can be improved by requiring incumbents to disaggregate support so it is more accurately targeted, as incumbents advocated in the RTF process. Proposing to redefine rural ILEC service areas along wire center boundaries will also improve the process. USCC urges the Commission to follow the Washington Commission's example, which is working to advance infrastructure development in rural areas while encouraging new competitors to construct facilities only in high-cost portions of the state.

The Joint Board's proposal to move to a primary line restriction is ill-advised. There are numerous administrative problems which will dilute all carriers' ability to deliver high-quality services and waste valuable support funds. The Joint Board's proposals are not competitively

neutral in that they hold incumbents harmless while continuing to require competitors to take business risk in order to access funding. The various hold-harmless proposals cannot survive judicial review. Eight years after Congress commanded and three years after the RTF Order, which promised a transition to an environment where competitors and incumbents are placed on a level playing field to compete for customers, the Commission must adopt rules which finally carry out its Congressional mandate.

COMMENTS OF
UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC"), by counsel, hereby provides the following comments in response to the Commission's Notice of Proposed Rulemaking, FCC 04-127 (released June 8, 2004) requesting comment on the recent *Recommended Decision* of the Federal-State Joint Board on Universal Service.[1]

I. Introduction.

Eight years ago, when the FCC released its first universal service order, then Chairman Reed Hundt set forth the Commission's course for universal service policy, stating:

> Ultimately, we all know that our success will not be measured by whether we have pleased one company or another, or one member of Congress or another. It will be measured by whether, five years from now, American citizens, whether in their businesses or in their homes, have a greater choice of communications providers and services than ever before. If, in five years, there are at least a handful of different companies knocking on doors competing to win the business of the households or companies, then our efforts will have succeeded. What people buy, how they pay, what they get, will all be different. But if we do right consumers will get more for their money. And if there are many sellers of services – and not just monopolies – then our efforts will have succeeded.[2]

USCC provides PCS and cellular services in 44 MSAs, 100 RSAs, 1 MTA and numerous BTAs throughout the country. Roughly half of the company's customers reside in rural America. The company is well versed in the ETC designation process. USCC has received ETC status and is currently receiving high-cost support covering operations in Washington, Iowa, Wisconsin and has just recently been designated in Oregon. In Wisconsin and Oregon, USCC has endured protracted litigation that has resulted in a close examination of our qualifications through the

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[1] *Federal-State Joint Board on Universal Service, Recommended Decision,* 19 FCC Rcd 4257 (Jt. Bd. 2004) ("*2004 Recommended Decision*")

[2] Speech by FCC Chairman Reed Hundt to National Association of Regulatory Utility Commissioners, February 27, 1996: Questions and Consequences: How do we get to the right answers?

administrative hearing process, most of which resulted from competitors simply wishing to delay the process and present any number of irrelevant issues under the public interest standard.

As such, USCC is qualified to provide the Commission with comments on, (1) how the process for obtaining ETC status can be improved, (2) moving forward on the twin goals of advancing universal service and introducing competition to rural areas, and (3) why the FCC has to date provided exactly the correct incentives for rural CMRS carriers – especially those that are invested in their communities – to improve this nation's critical wireless infrastructure.

II. The Commission and the States Are Without Authority to Impose Additional ETC Eligibility Requirements

A. To Construe § 214(e) to Permit the Imposition of Additional Eligibility Requirements is Wholly Inconsistent with the Commission's Formally Adopted Construction of that Provision

Remarkably, the Joint Board recommends the Commission adopt "flexible and non-binding" federal guidelines for ETC qualifications under which "state commissions would retain their rights to determine eligibility requirements for designating ETCs."[3] And it recommends that the Commission employ the same guidelines in its ETC designation proceedings under § 214(e)(6) of the Act.[4] *See id*. These recommendations are remarkable in their diametric inconsistency with the Joint Board's recommendations in 1996.

In 1996, the Joint Board recommended that the statutory criteria set out in § 214(e)(1) of the Act be used as the rules to determine ETC eligibility.[5] The Joint Board found that § 214 "contemplates" that any telecommunications carrier that meets the eligibility criteria of §

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[3] *2004 Recommended Decision, supra, at* 5.

[4] *See id*.

[5] *See Federal-State Joint Board on Universal Service, Recommended Decision,* 12 FCC Rcd 87, 169 (Jt. Bd. 1996) ("*1996 Recommended Decision*").

214(e)(1) shall be eligible to receive universal service support.[6] It concluded that "this approach best embodies the pro-competitive, de-regulatory spirit of the 1996 Act and ensures the preservation and enhancement of universal service."[7]

The Joint Board read § 214(e) to *require* the designation of more that one ETC in areas not served by rural telephone companies as long as the carriers meet the eligibility criteria of § 214(e)(1).[8] In areas served by rural telephone companies, the Joint Board construed § 214(e)(2) as giving state commission the discretion to designate more than one ETC "as long as the such designation is found by the state commission to be in the public interest."[9]

The Joint Board also recommended against the imposition of eligibility criteria in addition to those contained in § 214(e)(1).[10] It specifically concluded that establishing "federal rules or guidelines that would impose symmetrical regulatory obligations on all carriers receiving universal service support are unnecessary to protect the incumbent and would chill competitive entry into high cost areas."[11]

In 1997, the Commission adopted the Joint Board's recommendation that the statutory criteria contained in § 214(e)(1) be the rules for determining ETC eligibility.[12] It based its

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[6] *Id*. at 171.

[7] *Id*. at 170.

[8] *See id.* at 172.

[9] *Id*.

[10] *See id*. at 170.

[11] *Id*.

[12] *See Federal-State Joint Board on Universal Service, Report and Order,* 12 FCC Rcd 8776, 8850-51 (1997) ("*First Report and Order*").

decision on an explicit interpretation of § 214(e) and an application of § 253 as well.[13] First, the Commission read § 214(e)(1) and (2) to prohibit the supplementation of the §214(e)(1) criteria:

> Read together, we find that these provisions dictate that a state commission must designate a common carrier as an [ETC] if it determines that the carrier has met the requirements of section 214(e)(1). Consistent with the Joint Board's finding, the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one [ETC] in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional [ETC] is in the public interest. The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.[14]

Second, the Commission found that the discretion of state commissions is limited by § 253:

> . . . a state's refusal to designate an additional {ETC} on grounds other than the criteria in [§] 214(e) could "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" and may not be "necessary to preserve universal service." Accordingly, we conclude that [§] 214(e) precludes states from imposing additional eligibility criteria.[15]

Like the Joint Board, the Commission construed § 214(e)(2) in 1997 to achieve Congress's goal of "opening up all telecommunications markets to competition."[16] Thus, it agreed with the Joint Board's conclusion that the imposition of additional obligations on competitive carriers as a condition of ETC eligibility would "chill competitive entry into high cost areas."[17] Proposals to impose pricing, marketing, service provisioning, and service quality

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[13] S*ee id*. at 8851-55.

[14] *Id.* at 8852 (footnotes omitted).

[15] *Id.* at 8852 (footnotes omitted) (quoting 47 U.S.C. § 253(a), (b)).

[16] *Id.* at 8781. The Commission "intended to encourage the development of competition in all telecommunications markets." *Id*. at 8782.

[17] *Id*. at 8858 (quoting *1996 Recommended Decision*, 12 FCC Rcd at 170).

obligations as a condition of being designated an ETC were rejected by the Commission, because § 214(e) did not grant it "authority to impose additional eligibility criteria."[18]

Congress employed the language of § 214(e)(2) when it enacted § 214(e)(6) in 1997 to authorize the Commission to designate as ETCs carriers that are not subject to the jurisdiction of a state commission.[19] Having already construed the language of § 214(e)(2) in the *First Report and Order* to prohibit it from supplementing the § 214(e)(1) eligibility criteria, the Commission adopted the requirements of § 214(e)(1) as its eligibility criteria for designating ETCs under § 214(e)(6).[20]

The Commission defended its interpretation of the statute in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"). With respect to a carrier seeking federal universal service support in non-rural service areas that satisfies the § 214(e)(1) criteria, the Commission argued that a state commission "*must* designate it as eligible" and "may not impose additional eligibility requirements."[21] Because the Commission's interpretation of the ambiguous provisions of § 214(e) was authorized by Congress, and consistent with the "pro-competitive" mandate of the 1996 Act, that construction of the statute had the effect of law[22] and was entitled to deference from the Fifth Circuit under the *Chevron* doctrine.[23]

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[18] *Id.* at 8856.

[19] *Compare* 47 U.S.C. § 214(e)(2) *with* § 214(e)(6).

[20] *See Procedures for FCC Designation of ETCs Pursuant to Section 214(e)(6) of the Act*, 12 FCC Rcd 22947, 22948-49 (1997) ("*Section 214(e)(6) PN*").

[21] *TOPUC*, 183 F.3d at 417 (emphasis in original).

[22] *See United States v. Mead Corp.,* 533 U.S. 218, 219 (2002) (Congress gave agency the interpretative authority "to speak with the force of law when its addresses ambiguity in the statute or fills a space in the enacted law").

[23] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

B. The Fifth Circuit Erred When it Rejected the Commission's Permissible Construction of § 214(e)(2)

The Fifth Circuit acknowledged that *Chevron* step-two deference was due the Commission where the 1996 Act was "silent or ambiguous."[24] Thus, the court should have sustained the Commission's interpretation of § 214(e) if it was "based on a permissible construction of the statute,"[25] and reversed the Commission only if its interpretation was "arbitrary, capricious or manifestly contrary to the statute."[26]

The Fifth Circuit recognized that the language of § 214(e)(2) that a "State commission shall . . . designate a common carrier that meets the requirements of [§] 214(e)(1)] as an [ETC]" constitutes a statutory command.[27] Nevertheless, the court could see nothing in the 1996 Act that "indicates that this command prohibits states from imposing their own eligibility requirements."[28] Instead, it "read § 214(e)(2) as addressing *how many* carriers a state may designate for a given service area."[29] The court found that "[n]othing in the statute . . . speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers."[30]

Having found that the Act was silent as to whether the Commission could prohibit states from imposing additional ETC eligibility criteria, the Fifth Circuit should have addressed the

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[24] *See TOPUC*, 183 F.3d at 409.

[25] *Id.* (quoting *Chevron*, 467 U.S. at 843).

[26] *Id*. (quoting *Chevron*, 467 U.S. at 844).

[27] *Id*. at 418.

[28] *Id*.

[29] *Id*. (emphasis in original).

[30] *Id*.

issue of whether the Commission's interpretation § 214(e)(2) was based on a "permissible construction of the statute" under *Chevron* step two. Instead, the court reversed the Commission simply because the plain language of § 214(e) does not "prohibit[] the states from imposing their own eligibility standards."[31] Of course, that was based on the court's interpretation of § 214(e)(2), which it felt made "sense in light of the historical role in ensuring service quality standards for local service."[32]

The Fifth Circuit has been correctly criticized for not affording the Commission *Chevron* step-two deference in *TOPUC*.[33] The court also erred by failing to see that the statutory command that a state commission "shall" designate a carrier that meets the requirements of § 214(e)(1) as an ETC speaks directly to whether a state commission can impose additional eligibility criteria. Obviously, a state commission would not obey the command in the case of a carrier that meets the statutory ETC eligibility requirements but is found to be ineligible because it cannot satisfy a state's additional requirement.

C. The Commission Cannot Simply Acquiesce to the Fifth Circuit's Interpretation of § 214(e)(2)

The Commission wrongly acquiesced to the Fifth Circuit in *Virginia Cellular*.[34] On the "strength" of *TOPUC*, the Commission jettisoned the interpretation of § 214(e) that it formally adopted in its *Universal Service Order*. It suddenly found nothing in § 214(e)(6), which employs statutory language virtually identical to § 214(e)(2), to prohibit it from supplementing the §

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[31] *TOPUC*, 183 F.3d at 418.

[32] *Id*.

[33] *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001); *Comsat Corp. v. FCC*, 250 F.3d 931, 940 (5th Cir. 2001) (Pogue, J., concurring).

[34] *Virginia Cellular, supra,* 19 FCC Rcd 1563 (2004).

214(e)(1) eligibility criteria.[35] The Commission announced that henceforth the designation of an additional ETC in an area served by a non-rural telephone company will not necessarily be based merely "upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of [§] 214(e)(1) of the Act."[36] And when once it construed § 214(e) to prohibit it from imposing service quality obligations as a condition of being designated as an ETC, the Commission saw nothing in § 214(e) to prohibit it from imposing an "eligibility condition" in *Virginia Cellular*.[37]

When the Commission announced its acquiescence to *TOPUC*, the Joint Board was studying "the impact of the Fifth Circuit's decision regarding the Commission's ability to prohibit states from imposing additional eligibility criteria on ETCs,"[38] and doing so at the Commission's request.[39] Since the Commission jumped the gun and acquiesced, the Joint Board had little choice but to do the same. Citing *TOPUC* six times and *Virginia Cellular* three times, the Joint Board opines that § 214(e) demonstrates "Congress's intention" that state commissions "exercise broad discretion" in the ETC designation process.[40] According to the Joint Board's new view, it is no longer sufficient for state commissions to cite "generalized benefits of

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[35] *See id.*, 19 FCC Rcd at 1584 n.141.

[36] *Id.* at 1575.

[37] *Id*. at 1584 n.141.

[38] *Joint Board Seeks Comment on Certain of the Commission's Rules Relating to High- Cost Universal Service Support and ETC Designation Process*, 18 FCC Rcd 1941, 1955 (Jt. Bd. 2003).

[39] *See Federal-State Joint Board on Universal Service*, *Order,* 17 FCC Rcd 22642, 22647 n.15 (2002) ("*Referral Order*").

[40] *2004 Recommended Decision*, at 7.

competition" because § 214(e)(2) "requires states to undertake a fact-intensive analysis" of ETC applications.[41]

Congress did not disturb the language of § 214(e) since subsection (e)(6) was added in 1997. Only the Commission's and the Joint Board's reading of §214(e) has changed and it has changed dramatically. The Commission and state commissions have gone from having no authority to impose additional ETC eligibility requirements to having "broad discretion" to do just that.

A reasoned explanation is due whenever a federal agency flip-flops on its construction of a statutory provision.[42] That is particularly true in this case since the revised construction of § 214(e) directly impacts the jurisdiction of the Commission and state commissions.[43] Yet, neither the Commission in *Virginia Cellular* nor the Joint Board in its *2004 Recommended Decision* offered a reasoned explanation for the sudden interpretative change of heart.

Simply professing deference to the Fifth Circuit's reading of § 214(e) does not suffice as the Commission's reasoned judgment as to the meaning of the statute.[44] A single circuit court cannot determine the meaning of an ambiguous statute for the entire nation by imposing an interpretation that the agency must follow outside of the court's jurisdiction.[45] For that reason, the Commission is not required to follow the Fifth Circuit's approach to § 214(e)(2)

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[41] *Id.*, at 7 (emphasis added).

[42] *See Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989) (when an agency changes its interpretation of a statute, the change must be accompanied by a reasoned explanation).

[43] *See American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1567 & n.32 (D.C. Cir. 1987) (recognizing the pivotal distinction between the interpretation of statutory provisions that are jurisdictional in nature and those that are managerial).

[44] *See Holland v. National Mining Ass'n*, 309 F.3d 808, 816-19 (D.C. Cir. 2002).

[45] *See United States v. Mendoza*, 464 U.S. 154, 160 (1984).

nationwide.[46] Moreover, the Fifth Circuit construed § 214(e)(2) in light of the "states' historical role" in maintaining service quality standards for local service, a consideration that does not bear on the Commission's authority under § 214(e)(6). Therefore, the Commission cannot simply acquiesce to *TOPUC*. If it is to adhere to its new view of § 214(e), the Commission must give substantive reasons based on the statutory language for its repudiation of its initial interpretation of the provision.[47]

D. The Commission's Revised Interpretation of § 214(e) Defies the Plain Language of the Statute

The plain language of § 214(e)(2) and (6) denies the Commission or a state commission the authority to impose eligibility requirements beyond those imposed by 214(e)(1). Subsection (e)(2) (with respect to state commissions) and subsection (e)(6) (with respect to the Commission) provide that the agency "may" designate more than one carrier as an ETC in a rural area, but "shall" designate more than one carrier as an ETC in a non-rural area, "so long as each additional requesting carrier meets the requirements of [subsection (e)(1)]."[48] But before designating an additional ETC in a rural area, subsections (e)(2) and (e)(6) specify that the agency "shall find that the designation is in the public interest."[49]

As the Fifth Circuit conceded in *TOPUC*, "the use of the word 'shall' indicates a congressional command."[50] Hence, the statute commands either the Commission or a state commission to designate an additional requesting carrier to be an ETC in a non-rural if that

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[46] *See Holland,* 309 F.3d at 810.

[47] *See id.* at 818-19.

[48] 47 U.S.C. § 214(e)(2), (6).

[49] *Id.*

[50] *TOPUC*, 183 F.3d at 418.

carrier meets the requirements of § 214(e)(1). In the case of a non-rural designation, the statute plainly prohibits an agency from subjecting a requesting carrier to eligibility requirements other than the statutory requirements. Otherwise, as we have pointed out, an agency could disobey the congressional command to designate a requesting carrier that meets the statutory requirements by finding the carrier does not meet an additional requirement. Thus, the Commission cannot adopt the Joint Board's interpretation that the statute demonstrates that Congress intended to give agencies "broad discretion" in the process of designating an ETC for a non-rural area.

The Commission reasonably interpreted subsections (e)(2) and (e)(6) in the *First Report and Order* as also prohibiting an agency from imposing additional eligibility requirements on a carrier requesting ETC designation for a rural area.[51] That interpretation can be found to be correct, and the statutory language can be harmonized, by seeing the distinction Congress made between a determination of carrier's eligibility to be designated an ETC and a determination of whether the designation would be in the public interest.

Eligibility concerns the requesting carrier's ability to meet the statutory requirements to be an ETC. But a carrier can be eligible or "qualified" to be designated an ETC but the designation may or may not be "consistent with the public interest."[52] In the case of a designation of an ETC for a non-rural area, Congress determined that the designation of a carrier determined to be eligible under § 214(e)(1) is "consistent *per se* with the public interest."[53] Hence, the statutory command that an eligible carrier shall be designated demonstrates the congressional determination that "the promotion of competition is consistent with the public

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[51] *See First Report and Order*, *supra,* 12 FCC Rcd at 8852.

[52] 47 U.S.C. §§ 214(e)(2), (6).

[53] *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39, 46 (Com. Car. Bur. 2000), *overruled*, *Virginia Cellular*, *supra* ,19 FCC Rcd at 1575.

interest in those areas served by non-rural telephone companies."[54] In contrast, Congress clearly did not make that determination with respect to those areas served by rural telephone companies.

In the case of a carrier requesting designation for a rural area, the carrier may be eligible to be designated but the designation may or may not be in the public interest. Thus, subsections (e)(2) and (e)(6) provide that "[b]efore designating an additional eligible telecommunications carrier," an agency "shall find that the designation is in the public interest."[55] Hence, Congress commands an agency to find that the "benefits" of the competition that would result from the designation of an eligible carrier "outweigh[] any potential harms" before making the designation[56] As in the designation process for a non-rural area, an agency could disobey that command if it is allowed to impose an additional eligibility requirement on an ETC applicant for a rural area. The agency could disqualify a statutorily eligible carrier without making the requisite finding as to whether the designation would bring competition that would be in the public interest.

Only the foregoing interpretation of § 214(e) gives effect to all the requirements of subsections (e)(1), (e)(2) and (e)(6). It gives effect to the "consistent with the public interest" language of (e)(2) and (e)(6), because it "shall" be consistent with the public interest to designate an eligible carrier for a non-rural area and "may" be consistent with the public interest to designate an eligible carrier in a rural area. In both a rural and non-rural area, a designation would be made only "so long as the additional requesting carrier meets the requirements of [§ 214(e)(1)]." And, finally, our construction of § 214(e) gives effect to the congressional mandate

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[54] *Id*. at 46.

[55] 47 U.S.C. § 214(e)(2), (6).

[56] *Virginia Cellular*, *supra,* 19 FCC Rcd at 1575.

that an agency find that the "designation is in the public interest" before designating an eligible carrier in a rural area.

E. The Commission and the States Cannot Adopt Additional Minimum Eligibility Requirements

The Commission got it right in 1997 when it held that §§ 214(e) and 253 of the Act preclude both it and state commissions from imposing additional eligibility requirements.[57] Since Congress has not amended the relevant language of those two provisions, the Commission and the state commission remain powerless to adopt new minimum eligibility requirements, including the five recommended by the Joint Board.[58]

The Commission cannot enforce new "minimum qualifications" requirements[59] under the guise of imposing the requirements as a "condition of ETC designation."[60] It is authorized to prescribe conditions that are "not inconsistent with law" and are "necessary to carry out the provisions of the [Act]."[61] An ETC designation conditioned to impose a new eligibility requirement would be inconsistent with § 214(e) and thus unlawful.

III. The Commission Must Adopt Adjudicatory Procedures to Govern the ETC Designation Process

A. The Commission's Rulemaking Procedures Do Not Apply to ETC Designations

[57] *See First Report and Order, supra*, 12 FCC Rcd at 8851-52.

[58] *See 2004 Recommended Decision*, *supra,* at 9-16.

[59] *Id*. at 9.

[60] *Id*. at 12.

[61] 47 U.S.C. § 303(r). *See id*. § 154(i).

Applications for ETC designations often are hotly contested. Thus, the ETC designation process involves the "resolution of conflicting private claims to a valuable privilege."[62] As such, they are adjudications under § 551(7) of the Administrative Procedure Act ("APA").[63] Nevertheless, the Commission treats the designation process under § 214(e)(6) of the Act as a notice and comment rulemaking under APA § 553.[64]

For example, in the *Virginia Cellular* proceeding, the Wireline Competition Bureau ("Bureau") issued a public notice inviting "interested parties" to comment on the petition for designation under §§ 1.415 and 1.419 of the Rules.[65] Those two rules apply only in "notice and comment rulemaking proceedings conducted under 5 U.S.C. 553."[66] Moreover, the rules are triggered after a notice of proposed rulemaking ("NPRM") is issued.[67] *Id*. § 1.415(a). ETC designations cannot be made under APA § 553, and NPRMs are not issued in the designation process.

APA § 553 only governs a "rule making" by a federal agency. *See* 5 U.S.C. § 553. By definition, a rule making under the APA is an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A Commission proceeding under § 214(e)(6) is a process for formulating an order designating a carrier as an ETC "in accordance with" § 254 of the Act.[68]

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[62] *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

[63] *See* 5 U.S.C. § 551(7).

[64] *See id*. § 553.

[65] *Public Notice, Wireline Competition Bureau Seeks Comment on Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier Throughout Its Licensed Service Area in the State of Virginia, 17* FCC Rcd 8778, 8779 (Wireline Comp. Bur. 2002).

[66] 47 C.F.R. § 1.399.

[67] *Id*. § 1.415(a).

[68] 47 U.S.C. § 214(e)(1).

Section 254(a) in turn requires the Commission to establish the rules under which ETC designations are made in a proceeding subsequent to receiving the Joint Board's recommendations made "after notice and public comment."[69] Obviously, therefore, APA § 553 applies to the notice and comment proceeding required by § 254(a) to adopt rules for the ETC designation process, not to the designation process itself.

The Commission limited the scope of the rulemaking procedures set forth in Subpart C of Part 1 of the Rules to notice and comment proceedings conducted under APA § 553, and it did so in mandatory terms.[70] As we have shown, informal adjudications to designate CETCs cannot be conducted under APA § 553. It follows that the Subpart C rules, such as § § 1.415 and 1.419, do not apply to the ETC designation process.

B. ETC Designations Are Licenses Issued In Adjudications

Section 254(a) of the Act provides that "only an [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support."[71] Designation as an ETC is a "license" under the APA, because it serves as the Commission's "permit, certificate, approval . . . or other form of permission" to receive federal universal service support.[72] Hence, in *Virginia Cellular*, the Commission ordered that the cellular carrier be designated as an ETC

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[69] *Id*. § 254(a).

[70] *See* 47 C.F.R. § 1.399 ("subpart shall be applicable to . . . rulemaking proceedings conducted under 5 U.S.C. 553").

[71] 47 U.S.C. § 254(a).

[72] 5 U.S.C. § 551(8).

subject to certain conditions,[73] which permitted the carrier to receive "nearly $3.6 million per year" in the estimation of one ILEC.[74]

Under the APA, the process by which the Commission grants a "license" to receive universal service support constitutes "licensing."[75] Thus, it was a "process for the formulation of an order,"[76] "in a matter other than rule making but including licensing."[77] Therefore, the ETC designation process is an "adjudication" under the APA.[78]

The ETC designation process is an adjudication under accepted principles of administrative law. The process has been marked by disputes between ETC applicants and rural LECs,[79] and the "existence of a dispute concerning particular individuals is a distinguishing characteristic of adjudication."[80] The Commission effectively admits that the ETC designation process involves adjudication when it described its balancing of the "benefits of an additional ETC" against "any potential harms" as a "fact-specific exercise."[81] Moreover, it claimed that a

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[73] S*ee Virginia Cellular*, *supra,* 19 FCC Rcd at 1585-86.

[74] *See* Opposition of Verizon, CC Docket No. 96-45, at 2 n.2 (May 7, 2004).

[75] 5 U.S.C.§ 551(9).

[76] *Id*. § 551(7).

[77] *Id*. § 551(6).

[78] *See id*. § 551(7).

[79] *See, e.g., WWC Wyoming Order, supra; WWC Wyoming Recon. Order, supra.*

[80] *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981).

[81] *E.g., Virginia Cellular,* supra, *19 FCC Rcd at 1575*. When it engages in the fact-specific exercise of balancing benefits against harms in individual, contested cases, the Commission crosses a dividing line under the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Florida East Coast R. Co.,* 410 U.S. 224, 245 (1973).

failure to satisfy a "burden of proof" can be decisive with respect to a designation as an CETC.[82] The burden of proof is an adjudicative concept.[83]

C. Adjudicatory Procedures Must Be Employed in the ETC Designation Process

Under the *Accardi* doctrine,[84] the Commission must abide by its own rules,[85] as well as its Aestablished and announced procedures."[86] Thus, during the conduct of the ETC designation process, the Commission is obliged to adhere to the procedural requirements of the Rules that clearly apply to "non-notice and comment rulemaking proceedings."[87] Conversely, the doctrine prohibits the Commission from utilizing rulemaking procedures on an *ad hoc* basis in the adjudication of an application for designation as an ETC.[88] And clearly the Commission cannot employ Subpart C rulemaking procedures that are applicable to notice and comment rulemakings conducted under APA § 553.[89]

To date, it appears that the ETC designation process follows no one set of procedures. The Bureau routinely issues ETC designation orders pursuant to delegated authority, thereby

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[82] *See, e.g., Virginia Cellular*, *supra,* 19 FCC Rcd at 1575.

[83] *See American Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1343 n.8 (11th Cir. 1982) (application of "burdens of proof in a legislative, rulemaking context is awkward and problematic," because the concept was "developed in an adjudicative, fact-finding context").

[84] The *Accardi* doctrine holds that government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp*., 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998).

[85] *Reuters Limited v. FCC*, 781 F.2d 946, 947 (D. C. Cir. 1986).

[86] *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976).

[87] 47 C.F.R. § 1.4(b)(1*). See id*. §§ 1.45, 1.51(c), 1.106(a)(1),

[88] *See Reuters,* 781 F.2d at 950 (*ad hoc* departures from the Commission's own procedural rules, "even to achieve laudable aims, cannot be sanctioned").

[89] *See* 47 C.F.R. § 1.399.

attesting to the fact that the process is not one of rulemaking.[90] Other orders, such as *Virginia Cellular* and *Highland Cellular* have been issued by the Commission. The Bureau conducts ETC designation proceedings as quasi-rulemakings without apparent regard to principles of administrative standing and finality, established pleading requirements, and the procedural safeguards that traditionally apply to agency adjudications.[91]

The *ad hoc* procedures employed by the Bureau bespeak the Commission's failure to promulgate specific rules to govern the conduct of the ETC designation process. The Commission should take the opportunity of this rulemaking to put appropriate adjudicatory rules in place.

D. The ETC Designation Process Violates the *Ex Parte* Rules

The most troubling aspect of the Bureau's *ad hoc* procedures has been its wholesale departure from rules that are designed to "ensure the fairness and integrity of [the Commission's] decision-making."[92] The Bureau has run afoul of those *ex parte* rules by routinely permitting contested ETC designation cases to proceed under the "permit-but-disclose" rulemaking procedures of § 1.1206(a) of the Rules.[93] Those procedures are appropriate for an informal rulemaking proceeding under APA § 553,[94] but never in an ETC designation case that involves

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[90] The Commission has delegated no authority to the Bureau to issue orders in rulemaking proceedings. *See* 47 C.F.R. ' 0.291(e). Obviously, therefore, the Bureau cannot issue an order designating an ETC in a rulemaking proceeding.

[91] For example, the Bureau has departed from § 1.115(d) of the Rules by establishing its own pleading cycle for filing "comments" on applications for review of ETC designation orders, *see Pleading Cycle Established for Comments Regarding Applications for Review of Orders Designating ETCs in the State of Alabama*, 18 FCC Rcd 97, 97 (Wireline Comp. Bur. 2003), and has invited parties to supplement their opposition to such applications long after the 15-day deadline of § 1.115(d). *See Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, 19 FCC Rcd 6409, 6413 (Wireline Comp. Bur. 2004) ("Update Notice").

[92] 47 C.F.R. § 1.1200(a).

[93] *See, e.g., Update Notice, supra,* 19 FCC Rcd at 6411.

[94] *See* 47 C.F.R. § 1.1206(a)(1).

"private claims to a valuable privilege."[95] For that case would be a "restricted proceeding" under the *ex parte* rules.[96]

An adjudicatory proceeding under ' 214(e)(6) of the Act is not among those Aexempt@ proceedings in which *ex parte* presentations may be made freely.[97] Nor is it among those proceedings the Commission designated as "permit-but-disclose."[98] Consequently, a ' 214(e)(6) adjudication is a restricted proceeding in which *ex parte* presentations are banned until the proceeding is no longer subject to Commission or judicial review.[99]

We recognize the *ex parte* rules are subject to modification when the public interest so requires in a particular proceeding.[100] Modification is appropriate in a restricted proceeding if it "involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties."[101] ETC designation cases allegedly involve a "specific, fact-intensive inquiry" into the eligibility of a particular party and often a dispute over the right of that party to receive a multi-million dollar federal subsidy. The *ex parte* rules should never be modified in such a case, much less routinely waived by the Bureau without explanation and without finding that the public interest requires such action.[102]

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[95] *Sangamon Valley,* 269 F.2d at 224.

[96] *See* 47 C.F.R. § 1.1208.

[97] *See* 47 C.F.R. ' ' 1.1200(a), 1.1204(a).

[98] *See id*. ' 1.1206(a).

[99] *See id*. ' 1.1208.

[100] *See id*. ' 1.1200(a); *Beehive Telephone, Inc. v. The Bell Operating Companies*, 12 FCC Rcd 17930, 17937-44 (1997).

[101] 47 C.F.R. ' 1.1208, Note 2.

[102] *Compare id*. § 1.1200(a) *with Update Notice, supra,* 19 FCC Rcd at 6407.

In order to ensure the fairness and integrity of its decision-making in ETC designation cases, the Commission should amend § 1.1208 to explicitly include applications for ETC designation as among the proceedings identified as "restricted." Not only would that rule change safeguard due process rights, it would impose some order to the administrative record in ETC designation cases.

IV. The Commission Is Without Authority to Revoke or Rescind an ETC Designation

The Commission now claims it has the authority to "revoke" an ETC designation if the ETC fails to fulfill the requirements of the Act, the Rules, and the terms of its designation order.[103] The Joint Board believes that state commissions have the authority to "rescind ETC determinations."[104] We beg to differ with both conclusions.

A state commission may have the authority under state law to revoke an ETC designation that was issued pursuant to ' 214(e)(2) of the Act. That does not mean the Commission has the same authority with respect to its designation of an ETC under ' 214(e)(6). Unlike a state agency, the Commission is fully subject to the APA, which limits the power of an administrative agency to impose sanctions for statutory violations.[105]

A "sanction" under the APA "includes the whole or a part of an agency . . . requirement, revocation, or suspension of a license."[106] As we have discussed, an ETC designation under § 214(e)(6) qualifies as a license under the APA=s "extremely broad" definition.[107] Moreover,

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[103] *See Virginia Cellular*, *supra,* 19 FCC Rcd at 1585.

[104] *2004 Recommended Decision*, *supra* at 19.

[105] *See Zola v. ICC*, 889 F.2d 508, 515 (3d Cir. 1989).

[106] 5 U.S.C. ' 551(9)(F).

[107] *Air North America v. Dep=t of Transp*., 937 F.2d 1427, 1437 (9th Cir. 991).

only a designated ETC is "eligible to receive specific Federal universal service support."[108] Before designating an ETC for rural study areas, the Commission must find that the designation is "consistent with the public interest and necessity."[109] Thus, the designation is equivalent to a certificate of public convenience and necessity which has been found to be a "license" under the APA=s definition.[110] It is Apart of an agency permit, certificate, approval . . . or other form of permission@ that allows a carrier to receive universal service support.[111]

The APA provides that "[a] sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law."[112] Moreover, the APA requires an express grant of statutory authority for an agency to impose a sanction.[113] Nothing in the Act, nor any other statute, expressly authorizes the Commission to revoke an ETC designation.[114]

The Commission looks to ' 254(e) of the Act for its authority to revoke an ETC designation.[115] However, ' 254(e) provides that: (1) only a designated ETC shall be eligible to receive universal service support; and (2) an ETC "shall use that support only for the provision,

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[108] 47 U.S.C. ' 254(e).

[109] *See id*. ' 214(e)(6).

[110] *See Air North America*, 937 F.2d at 1437 (certificate of public convenience and necessity issued by DOT authorizing air operations was an APA "license" although it did not authorize air carrier to fly); *Bullwinkel v. Dep=t of Transp*., 787 F.2d 254, 255-56 (7th Cir. 1886) (airman medical certificates issued by FAA, and necessary to exercise privileges of pilot certificates, were APA "licenses"); *National Cable TV Ass=n, Inc. v. FCC*, 554 F.2d 1094, 1102 n.32 (D.C. Cir. 1976) (cable television certificates of compliance meet the definition of "license").

[111] 5 U.S.C. § 551(8).

[112] *Id* . ' 558(b).

[113] *See American Bus Ass=n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000).

[114] The Commission is expressly authorized to revoke a station license or construction permit. *See* 47 U.S.C. ' 312(a). An ETC designation does not fall with the statutory definition of "station license." *See id*. ' 153(42).

[115] *See Virginia Cellular*, *supra,* 19 FCC Rcd at 1585 n.143.

maintenance, and upgrading of facilities and services for which the support is intended."[116] Congress expressly authorized sanctions for noncompliance with other requirements of ' 254, but it authorized no sanction for noncompliance with ' 254(e).[117] And it certainly did not authorize the revocation of an ETC designation.

If an ETC fails to comply with the Act, the Rules, or its designation order, the Commission is authorized to seek judicial enforcement,[118] refer the matter for criminal prosecution,[119] or impose a forfeiture penalty.[120] However, absent statutory authorization, it cannot revoke the ETC's designation.[121]

Statutorily created benefits are "a matter of statutory entitlement for persons qualified to receive them."[122] Such entitlements are protected by the constitutional guarantee of procedural due process.[123] Considering that a ETC designation is a benefit created by ' 254 of the Act and conferred under ' 214(e), a carrier can claim a protected interest in its ETC designation. Therefore, if the Commission or a state commission deprives a carrier of its valuable ETC designation without prior notice and the opportunity to be heard required by due process, that agency action could be challenged under either the Fifth or Fourteenth Amendments.

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[116] 47 U.S.C. ' 254(e).

[117] *Compare id.* ' 254(e) *with* ' 254(h)(5)(F), (6)(F).

[118] S*ee* 47 U.S.C. ' 401.

[119] S*ee id.* '' 501, 502.

[120] *See id.* ' 503.

[121] *See American Bus*, 231 F.3d at 6-7.

[122] *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

[123] *See id.* at 262-63.

We respectfully suggest that the Commission reject the Board's recommendation that comment be sought on the question of whether any new designation requirements can be enforced retroactively to revoke an ETC designation.[124] An exploration of the issue would be statutorily, even constitutionally, futile.

V. The Commission Must Continue to Faithfully Implement the Law Congress Wrote.

A. Competitive ETCs are a Key Component in Advancing both Universal Service and Competition

In 1996, though the job of wiring up America was largely completed, rural consumers had no choice in local service providers. To tackle this problem, Congress determined that multiple ETCs should be designated to drive network development and innovation into rural, high-cost areas so that consumers can have the kinds of telecommunications choices enjoyed by their urban counterparts. This decision is now enshrined in the Act as one of the overarching principles governing universal service:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.[125]

In numerous orders and decisions over the past eight years, the FCC has made great strides in advancing Congress' vision, adopting competitive neutrality as a core universal service principle, providing guidance on how ETC petitions are to be decided, converting implicit support from ILEC rates and access charges into explicit support mechanisms, revamping how non-rural ILECs receive high-cost support from the fund, committing to do the same for rural

[124] *See 2004 Recommended Decision*, *supra,* at 19.

[125] 47 U.S.C. Section 254(b)(3).

ILECs, and reaching out to tribal lands to extend universal service benefits to the Americans most in need.[126]

The Courts have recognized that without access to high-cost support, a competitive carrier in rural areas has no hope of providing a service that competes in the local exchange marketplace in most rural areas.[127] Incumbents likewise have a sizable "first in" advantage in terms of service quality, as their networks are fully developed. New, facilities-based entrants are in the impossible position of having to construct an entire network without support before they can deliver competitive service quality. To state the obvious, this is America. If any entrepreneur could make a business out of competing with subsidized ILECs in rural areas without high-cost support, surely it would have happened by now in many rural areas.[128] Instead, competition in the local exchange marketplace remains limited to urban areas and densely populated suburbs.[129]

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[126] *See, e.g., First Report and Order, supra*; *Federal-State Joint Board on Universal Service, Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432 (1999) ("Ninth Report and Order"); *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208 (2000) ("Twelfth Report and Order"); *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) ("RTF Order"); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166*, 16 FCC Rcd 19613 (2001) ("MAG Order").

[127] *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1662 (2002) ("It is easy to see why [an ILEC] would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well."). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order,* 11 FCC Rcd 15499, 15506-07 (1996) ("*Local Competition Order*") ("The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.")

[128] Indeed, we have seen how difficult it is for new CLECs to compete with ILECs in urban areas where potential customers are plentiful, population densities are high, and construction costs are lower.

[129] For example, the Oregon PUC recently reported that over 20% of local exchange access lines are provided by competitive carriers. *See* "Status of Competition and Regulation in the Telecommunications Industry" at 1 (Jan.

Following the commands of Congress and the FCC's policy initiatives on universal service, state commissions have begun designating competitive ETCs. The process has not always been easy. Although Section 214 of the Act does not require a hearing or other extended administrative procedures to designate an ETC, and despite the FCC's clear message that ETC designation cases should be completed within six months,[130] many states have conducted contested administrative hearings, replete with discovery, briefing and oral argument to complete the process of designating a single competitive ETC. In so doing, the designation process has been substantially delayed for many carriers who are more than qualified to be ETCs and who can easily demonstrate that the public interest would be served by a grant.

Despite these delays, states by and large have accurately enunciated and followed the principles set forth by Congress and the FCC. There are numerous well thought-out decisions, resting on the foundation of full administrative hearings, that comport with the FCC's newly-announced policy that ETC designations must be based on a "more rigorous" public interest analysis.[131] Commissions in, for example, Arizona, New Mexico, Maine, Oregon, Alaska, Michigan, Washington, North Dakota, Minnesota, Wisconsin, and Kansas have made designations that consistently implement Congress' twin goals.[132] And in states that have not

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2001), available at http://www.puc.state.or.us/telecomm/ltcs.pdf. Unfortunately, that competition is concentrated in the Portland metropolitan area, prompting PUC Chairman Lee Beyer to remark: "we still have a long way to go to provide Oregon consumers with competitive options." *See* OPUC press release, "Oregon Telecommunications Market Improving" (Jan. 29, 2004), available at http://www.puc.state.or.us/press/2004/2004-001.htm.

[130] *Twelfth Report and Order, supra,* 15 FCC Rcd at 12215.

[131] *Virginia Cellular, supra, 1*9 FCC Rcd 1575.

[132] *See, e.g.,* Alaska DigiTel, L.L.C. Order Granting Eligible Telecommunications Carrier Status and Requiring Filings, Docket U-02-39, Order No. 10 (August 28, 2003) ("ADT Alaska Order"); Smith Bagley, Inc., Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2000) ("SBI Arizona Order"); Smith Bagley, Inc., Case No. 03-00246-UT, Recommended Decision of the Hearing Examiner (N.M. Pub. Reg. Comm'n, June 14, 2004) ("SBI Arizona 2004 Order"); N.E. Colorado Cellular, Inc., Docket Nos. 00A-315T and 00A-491T (Colo. PUC Dec. 21, 2001); Midwest Wireless Iowa, L.L.C., Docket No. 199 IAC 39.2(4) (Iowa Util. Bd. July 12, 2002) ("Midwest Iowa Order"); RCC Minnesota, Inc. et al., Docket No. 2002-344 (Me. PUC, May 13, 2003) ("RCC Maine Order"); RFB

conducted administrative hearings (because the statute does not require a hearing), competitive ETCs have been designated with no evidence of harm to consumers.[133]

Through the litigation process, states are designating new ETCs in rural areas based on several fundamental factors:

1. There is a direct correlation between poor wireless network coverage in rural areas and the lack of high-cost support. The very same problems facing rural wireline carriers that were highlighted in Rural Task Force White Paper #2 (cited by the Joint Board in its Recommended Decision) also challenge wireless carriers. Wireless carriers face a high threshold because they are attempting to compete with entrenched monopolies that have built formidable and high-quality networks which have been subsidized for decades.

2. Residential consumers in rural areas want wireless. The era of the wireline phone is passing. State regulators hear from consumers who demand high-quality wireless networks because they prefer mobility.

3. Businesses in rural areas depend more and more on mobile wireless connectivity. In many ETC designation cases, plumbers, farmers, ranchers, and others have made it clear that wireless is critical to the success of their business. The quality of telecommunications infrastructure is on the checklist of every company considering a move to or from a rural area.

Cellular, Inc., Case No. U-13145 (Mich. PSC Nov. 20, 2001) ("RFB Michigan Order"); ALLTEL Communications, Inc., Case No. U-13765 (Mich. P.S.C. Sept. 11, 2003); Midwest Wireless Communications, LLC, Docket No. PT-6153/AM-02-686 (Minn. PUC, March 19, 2003) ("Midwest Minnesota Order"); Cellular South Licenses, Inc., Docket No. 01-UA-0451(Miss. PSC Dec. 18, 2001)("Cellular South Mississippi Order"); Smith Bagley, Inc., Utility Case No. 3026, Recommended Decision of the Hearing Examiner and Certification of Stipulation (N.M. Pub. Reg. Comm'n Aug. 14, 2001 ("SBI N.M. Recommended Decision"), adopted by Final Order (Feb. 19, 2002) ("SBI N.M. Final Order"); Northwest Dakota Cellular of North Dakota Limited Partnership d/b/a Verizon Wireless et al., Case No. PU-1226-03-597 et al. (N.D. PSC, Feb. 25, 2004) ("Verizon Wireless N. Dakota Order"); WWC License LLC d/b/a Cellular One, Docket No. 00-6003 (Nev. PUC Aug. 22, 2000) ("WWC Nevada Order"); RCC Minnesota, Inc., Docket No. UM-1084 (Or. PUC, June 24, 2004) ("RCC Oregon Order"); *GCC License Corp.,* 623 N.W.2d 474, 481-82 (S.D. 2001); WWC Texas RSA L.P., PUC Docket No. 22295, SOAH Docket No. 473-00-1168 (Tex. PUC Oct. 30, 2000) ("WWC Texas Order"); RCC Atlantic, Inc. d/b/a Unicel, Docket No. 5918 (Vt. Pub. Serv. Bd., Nov. 14, 2003); RCC Minnesota, Inc., Docket No. UT-023033 (Wash. Util. & Transp. Comm'n Aug. 14, 2002) ("RCC Washington Order"); AT&T Wireless PCS of Cleveland, LLC, Docket No. UT-043011 (Wash. Util. & Transp. Comm'n, 2004) ("AT&T Washington Order"); Easterbrooke Cellular Corp., Recommended Decision, Case No. 03-0935-T-PC (W.V. PSC, May 14, 2004) ("Easterbrooke Cellular"); United States Cellular Corporation, 8225-TI-102 (Wisc. PSC Dec. 20, 2002) ("U.S. Cellular Wisconsin Order"); NPCR, Inc., d/b/a Nextel Partners, Docket No. 8081-T1-101 (Wisc. PSC, Sept. 30, 2003) ("Nextel Wisconsin Order").

[133] For example, the Washington Utilities and Transportation Commission ("WUTC") recently noted that in the 4 years that it has been designating competitive ETCs, not a single ILEC has requested a raise in revenue requirements, and no customer of a rural ILEC has complained to the WUTC that a wireless ETC has caused harm. AT&T Washington Order, *supra*, at p. 11.

4. The health and safety benefits of wireless can only be achieved with improved network quality. Today, E-911 means nothing to anyone in a rural area who cannot make an important health or safety call because of poor coverage. To use the old adage, "you gotta walk before you can run." Rural consumers understand that mobile 911 – the ability to get an emergency operator beyond the wireline network, is far more important than landline 911. Every new cell site that is constructed with high-cost support delivers an increased area within which 911 calls can be made. Rural consumers are frustrated that they cannot enjoy these benefits – benefits that urban consumers now take for granted.

5. The only way to squeeze efficiencies out of incumbents is to introduce competition. The overwhelming evidence demonstrates that new ETCs are making new investments to upgrade facilities and accelerate the construction of new cell sites in rural areas. This can only benefit consumers, who will see higher quality wireless networks, forcing wireless carriers to respond in the market.

By considering these factors when analyzing new rules that will affect the ETC designation process or support to competitive carriers, the Commission is likely to arrive at a competitively neutral result.

B. Calls to Reverse Well-Considered and Effective Policy Initiatives Must Be Rejected

Unhappy with the fact that the states are properly carrying out their mandate, ILECs launched a rear-guard initiative at the FCC to undo policies that were both well thought out and properly implemented.[134] After months of intensive lobbying that proclaimed the system "broken" the FCC directed the Joint Board to begin a proceeding to make recommendations on whether the system should be reformed. Numerous arguments that the FCC has consistently rejected since 1996, and which have been rejected by almost every state that has considered them, were reconstituted for reconsideration by the Commission.

[134] *See, e.g.,* National Telecommunications Cooperative Association, Petition for Rulemaking to Define "Captured" and "New" Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307 et seq. (filed July 26, 2002).

For example, in many state proceedings, argument is made that CMRS carriers are already competing with ILECs. At the same time, argument is made that CMRS service and wireline service are not competitors, but are complementary services and therefore each should receive support, based on the costs of each providing service. Both of these arguments are unsupportable.

USCC can find no evidence in the line count data made available on the Universal Service Administrative Company ("USAC") web site that rural ILECs are losing a significant number of access lines as a result of competitive entry. In every ETC designation proceeding in which the issue has been raised, rural ILEC line counts have been steadily increasing over the past several years. ILEC penetration in rural areas remains at or near 100%, which undercuts any rational argument that CMRS or other technologies are already providing effective competition that removes the incumbent's monopoly control of the local exchange market.

USCC's service offerings are not merely complementary to wireline service in areas where wireless network quality is sufficient to permit a consumer to choose it as their primary voice communication service. Consumers are substituting wireless, especially in areas where local number portability mandates are gaining traction. In urban areas, RBOCs are reporting significant wireless substitution that is reducing access line counts. USCC's experience is similar, but only in the densely populated portions of their service areas – precisely those areas where signal strength is such that consumers can use wireless throughout the areas where they live, work and play.

If a consumer perceives a wireless telephone as a complementary communications tool because it only works on major highways and in downtown areas, then that consumer is denied the ability to use a wireless phone in the same manner as those living in urban areas. To compete

with ILECs and advance universal service by providing high quality service throughout a rural service area, an ETC must be able to construct high-quality network facilities.

In order to carry out its Congressional mandate, the Commission must continue to deliver sufficient high-cost support to provide customers with choices in service providers – not to support any one carrier or technology to the exclusion or detriment of another. In the short term, the universal service fund is likely to grow if rural ILECs continue to receive support utilizing the modified embedded cost methodology. Such expansion is to be expected as the FCC continues to fulfill its Congressional mandate to remove implicit subsidies from the system and place them in explicit support mechanisms. To the extent that universal service funds go to competitive ETCs ("CETCs") that are today bringing competitive choices to rural areas and improving critical wireless infrastructure, it should be viewed as a positive means to achieve the Congressional goals of the federal universal service fund. By more accurately targeting support to high-cost areas and encouraging competitive entry that will force ILECs to improve efficiencies, the Commission will reduce or eliminate the need for support in many rural areas and fulfill the twin goals of advancing universal service and competition.

C. The Federal High-Cost Fund is "Broken", but Not in the Ways Alleged by Some ILECs

For over two years, misleading arguments have been made alleging that the federal high-cost fund is broken as a result of competitive ETC designations. In fact, growth in the federal high-cost fund over the past five years has been the overwhelming result of increased support to incumbents. Without a doubt, support to new entrants has risen dramatically on a percentage basis, notably because it began from zero. However, support to incumbents, which operate mature networks that are not growing, has gone from approximately $1.7 billion per year to

approximately $3.15 billion per year in just five years.[135] Excluding the portion of this increase that represents the conversion of implicit to explicit support, this means that rural ILECs receive $600,000,000 ***more*** support in 2004 than they did in 1999. Of the roughly $3.28 billion in federal high-cost support distributed in 2003, competitive ETCs received approximately $131 million, or around 4 percent of the total.[136] To assist the Commission in understanding the relative impact ILECs and CETCs have had on the growth of the high-cost fund, USCC has attached as Exhibit 1 a chart based on data made available by USAC.

As a result of the FCC's recent decision to increase the "safe harbor" contribution factor to 28.5% for CMRS carriers, USCC estimates that each wireless line now contributes approximately $1.00 per month in federal universal service support. Given that there are over 160,000,000 wireless lines in service today, the wireless industry contributes roughly $2 billion per year and the number will grow for many years to come. Today, only a small fraction of those funds are available to competitive ETCs, while the vast majority subsidizes rural ILECs with whom wireless carriers seek to compete.

Most rural ILECs pay very little into the federal high-cost fund because payments are based only on the interstate portions of their bills. To paraphrase Senator Ernest Hollings' remarks at last year's Senate hearings on universal service reform, ILECs want to get this support, but they don't want to pay in. Wireless carriers contribute more than their fair share and are entitled to draw from the fund on a competitively neutral basis. In fact, if OPASTCO's own figures are to be believed, if every wireless carrier were designated as an ETC throughout the country, the draw on the high-cost fund would be $2 billion. While such a scenario is unlikely, at

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[135] *See id.*

[136] Source: Universal Service Administrative Company, Distribution of High-Cost Support Between CETC and ILEC, 1998 Through 2Q2004, available at http://www.universalservice.org/hc/whatsnew/072004.asp#072704.

that point, wireless carriers would still be contributing more than they draw, as wireless subscribership and corresponding contributions continue to increase.

USCC does not come before this Commission seeking policies that would cut support to rural ILECs. Decisions must be based on facts, not hyperbole such as that which permeated the Tauzin-Dingell debate in Congress several years ago. If the system is broken, it is broken because ILECs draw significantly more than they did just a few years ago without any oversight as to whether their investments are necessary or efficient for consumers. Competitors are limited to per line support and must take significant business risk to make investments that will only pan out if the carrier is successful in gaining enough customers and support.

Some have argued that the way to fix the system is to pay each carrier based on its own costs. Such a system would insulate incumbents from competition and lessen for each carrier the incentive to innovate or make efficient network investments. Each carrier would have the reverse incentive – to construct networks to get support – which is the fundamental problem with the current high-cost mechanism.

To give just one example, the Helix Telephone Company in Oregon serves approximately 500 access lines in two non-contiguous wire centers. Helix recently applied to the Oregon Public Utility Commission ("OPUC") for a waiver of local number portability ("LNP") requirements because it would be unduly burdensome to replace both of their switches, each at a cost of over $250,000.[137] With the availability of soft switches, switch sharing capabilities, and other possible solutions, it is inconceivable that any carrier would invest in two switches amounting to $500,000 to upgrade 500 access lines **if it were in a competitive marketplace**. Another network design almost certainly could provide a more efficient means to offer LNP, but Helix has no

[137] Helix Telephone Co., Petition for Suspension of Wireline to Wireless Number Portability Obligations, Docket No. UM 1125 at p. 2 (Or. PUC, Jan. 27, 2004) ("Helix Order").

incentive to facilitate a choice of service providers for consumers. If the OPUC denies its LNP extension Helix foresees a $500,000 investment in switch upgrades that, however inefficient, is recoverable under the current state and federal high-cost support mechanisms.

This turns the entire purpose of the 1996 Act on its head. The purpose of the Act was to drive competition for both customers and support into every possible corner of the country so that efficient investments are made and support is used to benefit consumers. We know of no public policy that supports funding the least efficient provider of services in an area. If a more efficient provider can come in and ultimately draw less support, then that should be encouraged.

Some have argued that current federal policy may foster "artificial competition", that is, supporting multiple networks in areas that cannot support even one. Generally, this view is espoused by monopolists and is diametrically opposed to the Act's command to advance universal service in high-cost areas. We can find nowhere in the 1996 Act or its legislative history any expression that the new law was intended to support a single network or a single connection. Most rural Americans, who literally cry out for improved wireless services and competition for their local exchange carrier, would revolt at such a notion. What is artificial is providing support to a monopoly carrier and, by regulatory fiat, locking out competitors who are ready, willing and able to deliver services that consumers in rural areas are demanding.

Restricting access by to the fund by competitive carriers in order to control growth of the fund is a solution to a problem that simply does not exist. Controlling growth of the fund is a burden to be shared by all carriers to be sure, however the place to begin is the Schools and Libraries program and examination of fund growth to rural ILECs. The Commission's recent slow-rolling of pending petitions for ETC status is frustrating the intent of Congress and is not competitively neutral.

In sum, conclusions that the system is broken due to competitive entry are unsupported. Whatever the Commission does to "fix" the system must be accomplished in a competitively neutral manner so that competitors who are serious about ETC status have every opportunity to deliver competitive services throughout every corner of this nation.

VI. Competitive Neutrality and Regulatory Parity Must Each Be Properly Implemented

A. Competitive Neutrality in Universal Service Rules Is A Core Principle that Must be Followed

In many ETC proceedings across the country, it is argued that regulatory parity requires an ILEC-centric, monopoly-era regulatory structure be imposed on competitive carriers. Fortunately, most states have rejected this and the Joint Board has, for the most part, agreed.[138] Competitive neutrality, a core principle for implementing universal service rules, requires that all universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[139]

ETC designation requirements should be equivalent between carriers that are ILECs and those that are not ILECs. However, this does not mean that ILEC regulation intended for monopoly carriers can simply be imposed on all competitors. For example, unless service quality standards are imposed on ILECs *as a condition of their ETC designation,* it is not competitively neutral to impose ILEC-like service quality standards on other classes of carriers as a condition of obtaining or retaining ETC status. The FCC or a state may repeal service quality standards applicable to ILECs without affecting their ETC status. Many states have fined or otherwise penalized ILECs for poor service quality without disturbing their status as ETCs.

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[138] *See 2004 Recommended Decision, supra,* 19 FCC Rcd at 4271 ("Our recommendation here . . . is not that competitive ETCs should be required to comply with all of the standards imposed on wireline incumbent LECs as some commenters have proposed. States should not require regulatory parity for parity's sake.") (footnote omitted).

[139] *First Report and Order, supra,* 12 FCC Rcd at 8801.

If service quality standards are to be developed for competitive carriers, the far better course is to do so in a proceeding of general applicability so that all carriers may participate and develop a record that results in rules applicable to all carriers. The argument that an ETC must be held to a higher standard ignores the fact that competitive ETCs are already held to a higher standard than ILECs. Competitors have customers who have a choice – if service quality is poor, consumers can and do switch carriers. The better course is to keep ETC status separate from operational regulation and limit regulation only to those matters necessary to advance universal service to consumers.

As a practical matter, it is not competitively neutral to place service quality standards applicable to ILECs, who have built mature networks with decades of subsidies, onto new carriers that have never been supported. In developing universal service rules such as those proposed in the *2004 Recommended Decision*, the Commission must be mindful that new rules must not only be competitively neutral on their face, but also have competitively neutral effects.[140] For example, while clarifying criteria for designating ETCs is a laudable goal, the Joint Board's often repeated mantra of "fact-intensive" inquiry[141] is not competitively neutral because the Joint Board proposes to place that inquiry only on new entrants. There is scant attention being paid today to whether ILECs are using federal support for its intended purpose, or whether investments are efficient or necessary. No financial qualification criteria were placed on incumbents. The Joint Board did not recommend to states that ILECs comply with the same reporting requirement that it recommends for new entrants regarding how support was used.

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[140] *See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling,* 15 FCC Rcd 15168, 15177 (2000) ("*South Dakota Preemption Order*") ("*South Dakota Preemption Order*") ("[T]he proper inquiry is whether the *effect* of the legal requirement, rather than the method imposed, is competitively neutral.") (emphasis in original).

[141] *See 2004 Recommended Decision, supra,* 19 FCC Rcd at 4261, 4262, 4279, n.179.

Until now, the FCC has carefully circumscribed its universal service rules to avoid chilling competitive entry [142] and to ensure that all carriers are treated equally. Competitive neutrality must guide the Commission's consideration of every Joint Board recommendation.

B. Universal Service Rules Are Not the Place to Achieve Regulatory Parity

In many ETC designation cases across the country and at the FCC, some have argued that ETC designation is voluntary – and with it come obligations. USCC has no problem with this concept, however it is unfortunate that some have stretched it to mean that all carriers must comply with monopoly regulatory structures imposed on ILECs. This has never been the law and the Commission must put this destructive and unlawful argument to rest.

The Act provides that a carrier need not be an ILEC to be an ETC and the FCC has confirmed that "[S]ection 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs . . . Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers."[143]

Across the country, states have imposed monopoly-style regulations on ILECs not as a *quid pro quo* for ETC status, but because consumers must be protected from monopoly business practices. The 1996 Act promised to advance universal service and introduce competition into these markets so that consumers will benefit and the Act's deregulatory mandate can be achieved by lowering regulatory burdens on ILECs.

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[142] *See First Report and Order, supra,* 12 FCC Rcd at 8858 (where the Commission refused to impose new carrier of last resort obligations and service quality regulation on new entrants because it could chill competitive entry in rural areas.)

[143] *Id.* at 8858-59.

Regulatory parity is properly invoked when carriers compete on a relatively level playing field. CMRS carriers, for example, have relatively equal regulatory burdens and regulations are not targeted at less than all carriers. ETC status does not change this equation – CMRS carriers who are ETCs continue to operate in a fiercely competitive marketplace while ILECs continue to be monopolies until such time as effective competition for local exchange service can be introduced.

C. States Have No Authority to Impose Local Usage Requirements as a Condition to Grant of CETC Certification

The Joint Board erroneously opines that "states may consider how much local usage ETCs should offer as a condition of federal universal service support."[144] In fact, 47 C.F.R. Section 54.101(a)(2) specifically defines local usage as "an amount of minutes of use of exchange service, ***prescribed by the Commission***, provided free of charge to end users" (emphasis added). The Commission has on numerous occasions ruled that when an ETC offers a variety of rate plans that contain a variety of local usage levels, it meets the rule's requirement.[145] States are not empowered to redefine what is required of any ETC participant.

Requiring any specific amount of local usage is rate regulation that states are not empowered to enact.[146] If a state requires any carrier to increase its local usage, then either the cost per minute must go down or the overall price must be raised. This conclusion is inescapable

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[144] *2004 Recommended Decision, supra,* 19 FCC Rcd at 4271.

[145] *See, e.g., Highland Cellular, Inc.,* 19 FCC Rcd 6422, 6429 (2004) ("*Highland Cellular*"); *Virginia Cellular, supra* 19 FCC Rcd at 1572; *Pine Belt Cellular, Inc. and Pine Belt PCS, Inc.,* 17 FCC Rcd. 9589, 9593 (2002) ("*Pine Belt Order*"); *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming,* 16 FCC Rcd 48, 52 (2000) ("*WWC Wyoming Order*"), *recon. denied,* 16 FCC Rcd 19144 (2001) ("*WWC Wyoming Recon. Order*").

[146] *See* 47 U.S.C. § 332(c)(3).

and it is precisely why the FCC's rules were crafted to leave this matter squarely within the Commission's purview.

As a practical matter, state by state regulation of minimum local usage is unworkable and will have uniformly negative consequences for consumers, who now enjoy a wide selection of rate plans, as well as mobility and wider local calling areas that the FCC and many states have found to serve the public interest.[147] Many ILECs offer consumers the option to select metered service plans that have zero minutes of local usage included. There is no rational reason to deny these rate plans to consumers who value them.

In areas where competitive networks are developed, consumers today have the option to choose wireline and wireless service, each of which offers advantages and disadvantages. Wireless consumers have the option of choosing the amount of local usage that meets their individual needs – and as such wireless carriers meet the local usage requirement. The Commission should decline to adopt the Joint Board's recommendation to authorize states to regulate the amount of service a carrier must offer, which is inescapably rate regulation.[148]

D. Congress Has Never Determined that Competition Might Not Serve the Public Interest

The Joint Board has unfortunately picked up on ILEC arguments that Section 214(e)(2) somehow expresses a Congressional understanding that competition may not always serve the

[147] *See, e.g., Virginia Cellular, supra,* 19 FCC Rcd at 1576 ("For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. Virginia Cellular also submits that, because its local calling area is larger than those of the incumbent local exchange carriers it competes against, Virginia Cellular's customers will be subject to fewer toll charges.")(footnote omitted); ADT Alaska Order, *supra*; SBI Arizona Order, *supra*.

[148] *See Bastien v. AT&T Wireless Service, Inc.,* 205 F.3d 983, 988 (7th Cir. 2000) ("[A] complaint that service quality is poor is really an attack on the rates charged for the service[.]"); *AT&T Co. v. Central Office Tel., Inc.,* 524 U.S. 214, 223 (1998) ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa").

public interest in areas served by rural carriers. There is no such suggestion anywhere within Section 214 or anywhere else in the 1996 Act. Congress expressed an unequivocal intent to drive competition throughout every corner of this nation, without exception. Competitive markets serve the public interest.

The public interest requirement of Section 214 was specifically intended to test whether the public would be served by a petitioner's designation. Will consumers in rural areas benefit from the designation? Will they see improved network facilities? Will they receive the same kinds of choices in telecommunications services as those that are available in urban areas in fulfillment of Section 254(b)(3)? All of these questions are important, and if an ETC petitioner does not make credible commitments to provision services to all requesting customers, then the introduction of a competitive carrier will not serve the public interest.

After eight years of promoting the benefits of advancing universal service and competitive entry, the Commission must not reverse itself and now follow those who seek only to restrict competitive entry.

VII. The Amount of Federal High Cost Support is Not a Proper Consideration in ETC Designation Cases

The Joint Board's recommendation included an opinion, but not a recommendation, that states may consider the level of support in an area when considering whether the public interest would be served by a grant. The Joint Board's concern is that when the amount of support on a per-line basis is high, funding multiple carriers could strain the high-cost fund.[149] These beliefs are absolute nonsense. High-cost areas are precisely where support should be directed. We can find no explanation in the law for the Joint Board ignoring obvious principles developed over eight years by the previously composed Joint Board and the FCC.

[149] *See 2004 Recommended Decision, supra,* 19 FCC Rcd at 4274.

A. It Matters Not How Many ETCs are Designated in High-Cost Areas

Some argue that designating multiple ETCs in high-cost areas will place a strain on the fund because it will result in multiple networks being constructed where even one network requires support. This argument is often combined with the statement that each carrier should receive support based on its own embedded costs. In fact, funding even one competitive ETC in a high-cost area on its embedded costs is likely to strain the fund more than funding five competitive ETCs on a per-line basis. To illustrate:

Under the current system, providing per-line support sets a "benchmark" which gives potential new ETCs an opportunity to determine in advance whether to make the commitments to offer and advertise service throughout an area, and ultimately whether to construct facilities. No matter how high the level of per line support, no competitive carrier will enter if the projected customer revenue and support levels will not support the investment.

In a sparsely populated area, there are a small and finite number of potential lines that can be captured. Assuming that a given area draws one competitive ETC who constructs facilities in a large portion of the area and captures a significant portion of the available demand for service, it will be doubly difficult for a second competitive ETC to commit to serve that area ***and to construct facilities to meet that commitment***. It will be even harder for a third carrier to do so. In order to meet their commitments to offer and advertise service throughout the area, subsequent ETCs will have to resell service on existing networks, which increases competition in a rural area without funding additional networks. The reason for this is that the current system does not provide support for resold lines. Most carriers do not want to be in the resale business in any significant way. Few, if any, carriers are going to propose to be an ETC in an area that is already

constructed by the competition and requires resale on a large scale. The current mechanism is a very effective self-regulating force on the number of ETCs in any given area.

The Joint Board's wrong-headed thinking that entry by new ETCs in high-cost areas should be restricted must be rejected.[150] Areas that are high-cost to serve are precisely those areas where the Commission should be encouraging competitive entry. And the Commission's current policies force competitors to assess ETC status in advance and only make efficient investments using scarce high-cost support.

B. The System Can Be Improved by Following Washington's Example of Requiring Disaggregation and Redefining Rural ILEC Service Areas

Rather than restricting entry in high-cost areas, the Commission should be encouraging it by more accurately identifying which areas are high-cost. Under the current system, unnecessary support may be provided to existing ETCs and a higher number of ETCs may be designated than are desirable. As set forth in RTF White Paper #6, ILECs and competitors agreed that disaggregation of support is necessary to properly target support to high-cost areas and reduce support to competitors in low-cost areas.[151] In the 2001 *RTF Order*, the Commission provided ILECs with the ability to tailor disaggregation plans under Path 2, so that competitive ETCs

[150] As shown below, the Joint Board's statement at para. 54 of the Recommended Decision that cream skimming is a concern where a competitor only enters low-cost areas is both unsupported and unsupportable, as the current rules enable rural ILECs to completely eliminate high-cost support to competitors in low-cost areas.

[151] "Disaggregation and Targeting of Universal Service Support," RTF White Paper #6 (September 2000) at p. 6, available at http://www.fcc.gov/wcb/universal_service/whitepaper6.doc ("Both competitive and incumbent carriers agree with the need to disaggregate and target universal support below the study area level … Thus, there is reasonable consensus that disaggregation of universal service support into smaller geographic areas furthers the goals of the 1996 Act by benefiting the highest cost rural customers and enabling competitive market entry. Indeed, disaggregating support targets that support to the most rural and high-cost zones within a given study area, enabling customers in those areas to receive services that are truly comparable to those provided in urban areas.").

would not receive support when serving low-cost areas and consumers in high-cost areas would see support levels rise, providing incentive for competitors to enter.[152]

Unfortunately, many ILECs declined to disaggregate support, preferring to use their Path 1 choice as a shield against competitive entry. For the most part, states have followed the FCC's (until recently) consistent advice that if a competitive carrier believes that support is being provided to competitors in low-cost areas, they retain the option under Path 2 to disaggregate support.[153] But in *Highland Cellular*, the Commission took a decidedly different tack, determining without any record evidence or rational explanation that "disaggregation may be a less viable alternative for reducing cream skimming opportunities" where the ILEC's study area "includes wire centers with highly variable population densities". "[154] USCC urges the Commission will reconsider its decision in response to petitions for reconsideration, because the evidence supports the opposite conclusion and consumers are harmed by it.

Instead, the Commission should look to the other Washington, where the Washington Utilities and Transportation Commission ("WUTC") has taken several simple steps to facilitate competitive entry and advance universal service in the state. First, the state has mandated disaggregation of support for all rural ILECs so that support is directed toward high-cost wire centers.[155] This decision ensured that competitors would receive little or no benefit from entering

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[152] *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking,* 16 FCC Rcd 11244, 11302 (2001) ("*RTF Order*").

[153] *See, e.g.,* RCC Maine Order, *supra,* at p. 11; ALLTEL Michigan Order, *supra*, at p. 15; Verizon North Dakota Order, *supra*, at pp. 10-12; AT&T Washington Order, supra, at p. 9; Application of Midwest Wireless Wisconsin, LLC for Designation as an Eligible Telecommunications Carrier in Wisconsin, 8203-TI-100 (mailed Sept. 30, 2003) ("Midwest Wisconsin Order") at p. 10; Easterbrooke W. Virginia Order, *supra*, at p. 55.

[154] *Highland Cellular, supra,* 19 FCC Rcd at 6437-38.

[155] In the Matter of Disaggregation of Federal Universal Service Support, Docket Nos. UT-013058 and 023020, Order Rejecting Disaggregation Filings by Asotin Tel. Co. and CenturyTel, and Directing Rural ILECs to File Disaggregation Plans With the Commission Not Later Than August 23, 2002 (Wash. Util. & Transp. Commn., Aug. 2, 2002).

as an ETC in low-cost areas – it being presumed that competition is going to come to those areas without support. This is precisely the same conclusion reached by the FCC in *Virginia Cellular*.[156] The obvious difference is that low-income consumers in the low-cost areas of Washington today have the benefit of discounted telephone service from competitive ETCs through the Lifeline and Link-up programs, while those in Waynesboro, Virginia, have been denied this benefit by the FCC.

Second, the WUTC has redefined the service areas of all rural ILECs so that each wire center is a separate service area.[157] This decision has opened up opportunities for competitors to enter without the need to go through individual service area redefinition proceedings pursuant to Section 54.207(b) -- thus sidestepping the FCC's glacial pace in acting on petitions for service area redefinition. The FCC acted jointly with the WUTC in approving the statewide redefinition, and rural consumers would be well served by a return to this sensible policy.

These two decisions have resulted in a level playing field for incumbents and competitors. Competitors receive no support for existing customers they have in low-cost areas and have an incentive to use support in high-cost areas to gain customers and additional support. Washington does not suffer from the protracted litigation that delays ETC designations at the FCC and across the country. Congress's goal of driving

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[156] *See Virginia Cellular, supra,* 19 FCC Rcd at 1580 ("[W]e believe that, if NTELOS had disaggregated, the low costs of service in the Waynesboro wire center would have resulted in little or no universal service support targeted to those lines. Therefore, our decision not to designate Virginia Cellular as an ETC in the study area of NTELOS is unlikely to impact consumers in the Waynesboro wire center because Virginia Cellular will make a business decision on whether to provide service in that area without regard to the potential receipt of universal service support.") (footnote omitted).

[157] *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Federal Universal Service Support, Memorandum Opinion and Order,* 15 FCC Rcd 9924 (1999).

infrastructure investment to high-cost areas and providing rural consumers with choices in telecommunications services is being fulfilled.

In sum, this Commission can remove support from low-cost areas and dramatically improve the ability of competitive ETCs to assess whether support levels in high-cost areas are sufficient to permit competitive entry. The Commission could amend Section 54.315 of its rules so as to require rural ILECs throughout the country to disaggregate and target support to individual wire centers immediately. In addition, the Commission could undertake to agree with states that rural ILEC service areas should, as a general matter, be redefined along wire center (or in some states, exchange area) boundaries. In so doing, scarce high-cost support will be preserved, competitors will not be rewarded for entering low-cost areas, and consumers in high-cost areas will receive much-needed facilities to bring the benefits of new technologies that are so badly needed.

VIII. Adopting a "Primary Line" Restriction is Inferior to the Current System.

A. The High-Cost System Does Not Support Connections -- It Supports Networks.

Incumbents and competitors agree on this point. Fundamentally, the Joint Board errs in its discussion of supported connections. It describes some connections as supplemental and delves into discussion of supporting secondary connections in rural areas.[158] This thinking is misguided in that neither incumbents nor competitors receive support for individual connections – they each receive support for constructing networks. The fact that competitors receive "per line" support does not mean that competitors extend facilities to individual customers in exchange for per line support, any more than ILECs did when their networks were immature. Carriers with new networks use the vast majority of per-line support on network facilities to

[158] *See 2004 Recommended Decision, supra*, 19 FCC Rcd at 4285-88.

extend service over a wide area, within which a carrier can offer and advertise its service. Consumers within that area are provided with a new choice in telecommunications service. They may choose it for primary service or secondary service, just as they do with the incumbent.

B. Supporting A Primary Line in a Competitively Neutral Fashion Will be Administratively Unworkable

USCC is prepared to compete in any environment that makes rational business sense and where there is a level playing field. But even assuming the Commission adopted a competitively neutral primary line plan, the administrative difficulties associated with determining a primary line will waste valuable support dollars that could be better spent delivering services at lower prices. Many commenters have defined the administrative challenges, including, but not limited to:

- Defining a household or account;
- Determining primary lines in homes and multi-tenant dwellings where unrelated individuals or groups have separate accounts;
- Adopting and enforcing rules for Letters of Agency ("LOA") similar to the interexchange business;
- Auditing consumers who will have an incentive to attempt to obtain multiple "primary" connections.

C. The Joint Board's Preliminary Proposals are Not Competitively Neutral

If a primary line restriction is to be implemented, the core principle of competitive neutrality must be respected and followed. In 2001, the Commission declared that by 2006, rural ILECs would be weaned off of the embedded cost methodology and moved toward a forward looking cost model that would include removal of all support from carrier rates as mandated by

the 1996 Act. In exchange for this promise, the Commission extended additional largesse on rural incumbents - $1.2 billion of additional high-cost support, according to the *RTF Order*.[159]

Apparently bowing to political pressure from incumbents, the Joint Board recommends that if a primary line restriction is adopted, that rural ILECs be cushioned – indeed insulated – from the positive effects that such a restriction could possibly have, through "hold harmless" mechanisms and other protections.[160] In a nutshell, there is no genuine public policy argument for adopting a primary line restriction. Such a system would continue to place business risk on competitors, while insulating incumbents from the effect of its primary purpose: to force all carriers to compete for consumers on a level playing field, with the winner getting the customer and the support.

If there is to be a primary line restriction, then the effect of such rules must be competitively neutral. Wireless carriers are prepared to compete for consumers and support on a level playing field – and will do so aggressively under any competitively neutral system. As proposed by the Joint Board, ILECs in rural areas will have an almost never-ending ability to lower prices and improve service in response to competitive entry – fueled by subsidies that are unavailable to competitors. That is not competitively neutral and the Joint Board's proposals to insulate ILECs is an absolute non-starter for competitors.

The Joint Board fundamentally violates the principles of competitive neutrality by expressing concern for seemingly any loss of support to incumbents. That concern will lead to unlawful results. Support is not for incumbents, or competitors. The Commission must only be concerned as to whether support is sufficient for consumers. As the *Alenco* court ruled:

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[159] *See RTF Order, supra,* 16 FCC Rcd at 11258 ("we estimate that the modified embedded cost mechanism will result in an increase in rural carrier support of approximately $1.26 billion over the five-year period.").

[160] *See 2004 Recommended Decision, supra,* 19 FCC Rcd at 4287-90.

> The purpose of universal service is to benefit the customer, not the carrier. "Sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy.[161]

It is disappointing that the Joint Board apparently refuses to acknowledge the law's command that universal service rules and policies may not be based on preservation of any one technology or class of carrier. Indeed, if no networks were in existence today in rural areas, we can imagine no public policy would favor funding wireline technology throughout the land – guaranteeing return on investment – while forcing competitors to take business risk in order to enter. And no party has ever articulated why consumers should pay to advance such a policy.

If the Commission looks to competitive ETC entry in model support states, it will find that the system is working as it should – and that forward-looking cost models are driving competitive entry, advancing universal service in some of the most rural areas of the country. For example, Cellular South in rural Mississippi, Highland Cellular in West Virginia, and Rural Cellular in Vermont and Maine, are all using funds to construct new networks, improving service to consumers, and fueling economic development in very rural and difficult areas being served by ILECs who receive support based on their forward-looking costs.

Concerns about incumbents in rural areas losing support must be tested. For example, Citizens Communications recently announced a special dividend of $2.00 per share, combined with an annual dividend of $1.00 per share, that amounts to nearly nine hundred million dollars ($900,000,000) in dividends to its shareholders (based on roughly 287,000,000 shares outstanding). Given that Citizens takes in roughly $150 million annually from the federal high-cost fund (or roughly 15% of this year's dividend pay out), it is difficult to understand the Joint Board's concern about loss of support to ILECs.

[161] *Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 621 (D.C. Cir. 2000).

The Joint Board's favorable treatment of rural ILECs was not lost on Wall Street. In its recent financial analysis of rural ILECs, Legg Mason Wood & Walker states:

> So what do we conclude? Are rural companies that rely heavily on USF bad investments? Our opinion is quite the contrary. We continue to believe that the core of our RLEC thesis remains intact — stable operating environment, improving opportunities for revenue growth, ***limited competitive risk, favorable regulatory treatment, and access to low-cost capital, high-quality plant, and other intangible advantages***. Our purpose in presenting this information is to shed some light on the importance of USF to rural service providers, and to demonstrate the impact that potential changes to the level, structure, or timing of the payments could have on these companies. The RTF has stated clearly, and the FCC has affirmed, that USF needs to continue at least at the current levels, and in fact, be allowed to expand, so that the proper level of investment can occur in rural telephony. If anything, we see the companies in the high-USF (more rural) regions as ***more defensible from a competitive point of view, and more predictable in terms of their cash flows*** (emphasis added).[162]

The public interest might be better served if Wall Street were expressing concern that rural ILECs will be forced to cut costs and profit margins in order to compete with newcomers, just as ILECs serving America's urban areas are being forced to do. It is no coincidence that the regions that are defensible from a competitive point of view due to favorable regulatory treatment are also those that lack high-quality wireless services.

It is likewise no coincidence that unlimited local and long distance plans are being aggressively offered by wireline carriers in urban areas, where competition has taken hold. These plans could have been offered literally decades ago – but only competition forced incumbents to drive these benefits to consumers. Rural consumers deserve the same kinds of choices and by driving network infrastructure development, this Commission will permit markets to deliver those benefits. This is not "artificial competition"; it is real competition and it is advancement of universal service that is the only hope for rural America to avoid being completely left behind.

[162] Legg Mason Wood Walker, Inc., Universal Service Financial Analysis, June 25, 2004.

Policies that protect incumbents at all costs are harming and will continue to harm rural consumers, who have been consigned to monopoly service for many decades. It is time for this Commission to do what is in the public interest – not what is in any class of carriers' interest. Wireless companies such as those represented herein come not to this Commission seeking arbitrage or hand-outs. USCC seeks a level playing field and competitively neutral opportunities to deliver their services to consumers who so obviously demand them – and demand high quality as well. This Commission must conclude that without access to high-cost support, many rural consumers will be indefinitely denied the high-quality wireless networks that they pay for, that they deserve, and that Congress promised in Section 254(b)(3) of the Act.

IX. High-Cost Support in Rural Areas Drives Economic Development

Our nation's rural areas have long trailed cities in terms of economic development. Use of high-cost support to improve infrastructure has significant economic impact on small communities and is a key to closing that gap. Today, many companies consider rural areas as more attractive places to locate and to live. One of the major factors involved in selecting a community is the quality of its telecommunications infrastructure.

Wireless service is a critical factor in the equation. More and more companies today rely on wireless phones to improve efficiencies and manage their businesses, especially in rural areas where the distances between job sites can be large, and in the case of farms and ranches, the job site itself can be quite large. Any policy that cements wireline monopolies in rural areas and retards the development of wireless infrastructure only widens the gap between rural and urban areas, in direct contravention of Congress's express goal.

In USCC's experience, there is a general consensus among the states that ILEC-style regulation is intended to protect consumers from monopoly business practices and is not

necessary in competitive markets. The heavy advertising campaigns being conducted by the United States Telecom Association ("USTA") on behalf of ILECs has convinced many that the time is drawing near to deregulate ILECs, as their monopoly grip on the local exchange market is loosening – at least in urban areas.[163] The problem with that message is that many rural areas have largely missed out on the proliferation of competitive options occurring in urban and suburban markets. According to the most recent publicly available FCC statistics, many states continue to suffer. For example, 89% of the zip codes in West Virginia have no competitive options.[164]

Advancing universal service means making rural areas an attractive place for business to locate, so that rural areas can retain talented people and their children.

X. Financial Qualification Standards Should be Rejected or Applied to All ETCs in a Competitively Neutral Fashion

The Joint Board's recommendation that a financial qualification standard for ETCs be developed presents competitive neutrality concerns. ILECs were not required to pass any financial qualification test before being designated as ETCs. Thus, it is not competitively neutral to impose such a standard on new ETCs. If it is to be imposed, then all ETCs must be reviewed as well, on the same basis as new entrants.

If financial qualifications are to be measured before support is provided, then ILECs must likewise be required to demonstrate that they are financially sound, without the benefit of high-

[163] For example, the Oregon PUC recently reported that over 20% of local exchange access lines are provided by competitive carriers. *See* "Status of Competition and Regulation in the Telecommunications Industry" at 1 (Jan. 2001), available at http://www.puc.state.or.us/telecomm/ltcs.pdf. Unfortunately, that competition is concentrated in the Portland metropolitan area, prompting PUC Chairman Lee Beyer to remark: "we still have a long way to go to provide Oregon consumers with competitive options." *See* OPUC press release, "Oregon Telecommunications Market Improving" (Jan. 29, 2004), available at http://www.puc.state.or.us/press/2004/2004-001.htm.

[164] *See* Local Telephone Competition: Status as of June 30, 2004 (Industry Analysis and Technology Div., Wireline Competition Bur., December 2004) at Table 16, available on the FCC's web site at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf.

cost support being provided. In some proceedings, rural ILECs have testified that they receive as much as 60% of their revenue through state and federal high-cost mechanisms. In recommending that these standards be imposed, the Commission runs the risk of disqualifying numerous rural ILECs who have freely admitted that they would not be in business without high-cost support.

The FCC's decision to provide support to competitive carriers only on a "per line" basis is precisely the correct policy in ensuring that support is used efficiently. Carriers in financial distress who sell out or merge will pass ETC status on to a new owner and the FCC will have an opportunity to examine the new carrier's financial qualifications in the course of processing an application for assignment or transfer of control.

Imposing new financial qualifications criteria will provide little or no new assurances that services will be delivered efficiently and will not provide real benefit to consumers.

XI. Conclusion.

USCC requests that the Commission take action consistent with the foregoing in response to the Joint Board's recommendations.

Respectfully submitted,

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Exhibit 1

USF Disbursements